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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

REGINALD DEAN STILL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the offense of attempted bank robbery, in violation of the Bank Robbery Act, 18 U.S.C. (& Supp. IV) 2113(a), requires the government to prove that a defendant had undertaken "actual movement toward the bank or actions that are analytically similar to such movement" at the time that his plans were foiled, regardless of the strength of the other proof that a bank robbery was in the offing.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The revised opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 850 F.2d 607. The initial opinion of the court of appeals is reported at 837 F.2d 871.[1] The

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[1] The revised opinion of the court of appeals is identical to the court's initial opinion except that the revised opinion explicitly upheld respondent's conviction on the charge of interstate transportation of a stolen motor vehicle, added a clause to the second paragraph of the opinion stating that fact, and added the final two paragraphs of the opinion to explain the reasons for the affirmance of that conviction. Because the two opinions are identical with respect to the issue pre-

opinion of the court of appeals on the denial of respondent's rehearing petition (App., *infra*, 10a-13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1988. A petition for rehearing filed by the government was denied on July 6, 1988. App., *infra*, 9a. A petition for rehearing filed by respondent was denied on September 20, 1988. App., *infra*, 10a-13a. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Bank Robbery Act, 18 U.S.C. (& Supp. IV) 2113(a), provides in relevant part as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; * * *
>
> * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, respondent was con-

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sented in this petition, we have not separately reproduced the initial opinion in the appendix.

victed of attempted bank robbery, in violation of 18 U.S.C. (& Supp. IV) 2113(a), and interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312. The district court sentenced respondent to 15 years' imprisonment on his bank robbery conviction, it suspended the sentence on his stolen vehicle conviction, and it placed him on five years' probation following his release from confinement. The court of appeals reversed respondent's bank robbery conviction.[2]

1. At approximately 10:30 a.m. on August 7, 1985, Kelli Ross saw respondent sitting on the passenger side of a van that was parked at a shopping center in Roseville, California. Ross noticed that the van's motor was running, and she saw respondent put on a long blond wig. Concerned, Ross promptly notified the police. Tr. 9-12. Officer Hensley of the Roseville Police Department arrived about seven minutes later in a marked patrol car and drove in front of the van. The motor of the van was still running. As Officer Hensley started to get out of the patrol car, he saw respondent move from the rear of the van to the driver's seat, put the van in reverse, and drive off. Officer Hensley followed respondent as he sped out of the parking lot and drove through several residential backyards, knocking down fences. Respondent eventually wedged the van between two houses and fled to a nearby camper-trailer, where he was arrested by Officer Hensley and other officers. Tr. 3, 9-12, 36-57. Following his arrest, respondent told Officer Hensley: " 'You did a good job. You caught me five minutes before I was going to rob a

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[2] The court of appeals affirmed respondent's conviction for the interstate transportation of a stolen motor vehicle and remanded the case to the district court for resentencing.

bank. That's what I was putting the wig on for.' " Tr. 58; App., *infra,* 2a-3a.[3]

At the local police station, respondent was interviewed by state and federal agents. Respondent said that he intended to rob a bank to recoup his recent gambling losses. Tr. 206-209. He said he intended to use a fake explosive device, and he was preparing to commit the robbery when he was approached by Officer Hensley in the parking lot. Respondent said that he intended to drive to the drive-up window of the bank and to place the fake bomb and a demand note on the window. Tr. 85-86. Respondent also described the bank that he intended to rob. Tr. 86-87. His description matched the Security Pacific Bank, a federally insured institution located directly across from the shopping center, approximately 200 feet from the spot where respondent was parked. Tr. 87, 145-148, 150, 217; App., *infra,* 3a. At a speed of 15 miles per hour, it would take approximately 35 seconds to drive from that spot to the bank drive-up window. Tr. 217. Respondent also explained why he so candidly confessed his guilt: "What I am telling you is frosting on the cake. When you're caught, you're caught. Everything I am telling you you would learn when you get into that van anyhow, because all of the evidence that you need is located inside of it." Tr. 91.

Inside respondent's van, the officers found a variety of items that implicated him in his planned bank robbery and corroborated his confessions. Among the items was a realistic-looking fake bomb, consisting of a black box with a digital clock on the front, wire, lights, and batteries (Tr. 93-94, 131). Affixed to the fake bomb was tape that could be used to attach the bomb to the drive-up teller's window (Tr. 867). Also found were two demand notes.

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[3] Somewhat later, respondent told Officer Hensley that the van was stolen and asked, "How much do you get for auto theft around here." Tr. 58.

The first note, in typewritten form, said (GX 2):

> DO NOT–I REPEAT–DO NOT SOUND THE ALARM IF YOU DO I WILL LEAVE THE BOMB I HAVE ATTACHED TO THE WINDOW WITH A THIRTY SECOND TIMING FUSE–I WILL KNOW IF YOU RING THE ALARM BELIEVE ME GIVE ME ALL YOUR LARGE BILLS–TO TWENTIES OR TENS IN THE POUCH–FILL IT COMPLETELY–IF YOU ACT QUICKLY I WILL REMOVE THE BOMB AND DRIVE AWAY DO NOT FOR A MOMENT THINK I AM NOT ABSOLUTELY SERIOUS

In printed handwriting under the foregoing was written (*ibid.*):

> HUNDRED–FIFTIES–TWENTIES QUICK–LIFES DEPEND ON YOUR ACTING QUICK I HAVE A POLICE SCANNER I WILL KNOW IF YOU SOUND THE ALARM

A second typewritten note said (GX 3):

> I LIED–THE BOMB STAYS HERE–IT IS DESIGNED TO BE DETONATED BY REMOTE CONTROL AND ANY NEARBY TRANSMISSION OF THE LOCAL POLICE ROBBERY FREQUENCY WILL SET IT OFF AFTER 30 SECONDS–IF YOU SOUND THE ALARM AT ALL–EVEN AFTER I AM GONE–THE BOMB WILL GO OFF–DO NOT BE RESPONSIBLE FOR DESTROYING YOUR BANK AND KILLING THE PEOPLE–INCLUDING YOURSELF–DO NOT SOUND THE ALARM–THIS IS NO JOKE–THE BOMB HAS AN ELECTRONIC SE VO MECHANISM OPERATING IN THE MILLIHERTS RANGE AND IT OPERATES CORRECTLY AND WITHOUT FAIL WHEN IT RECEIVES THE SIGNAL . . .

The long blond wig seen by Kelli Ross was also found in the van (Tr. 98, 158). A police scanner, tuned to the local police department frequency, was also found in the van (Tr. 99-100, 158), as was a note with the radio frequency used by the Federal Bureau of Investigation (Tr. 227-228), a red notebook containing drafts of demand notes and the radio frequency of the Rocklin Police Department (Tr. 101-103), two altered Missouri license plates (Tr. 196), a fake Maine driver's license (Tr. 182-183), and a map of the local area (Tr. 159-168).

2. At trial, respondent pleaded insanity. He did not deny that he was about to rob the Security Pacific Bank when he was spotted by Officer Hensley. The jury rejected his insanity defense and convicted him of attempted bank robbery.

3. The court of appeals reversed. App., *infra,* 1a-8a. It held that attempted bank robbery requires proof of " 'culpable intent' " and " 'conduct constituting a substantial step towards the commission of the crime that is in pursuit of that intent.' " *Id.* at 4a (quoting *United States* v. *Buffington,* 815 F.2d 1292, 1301 (9th Cir. 1987)). The court found that respondent's post-arrest statements and description of the Security Pacific Bank "clearly established" his intent to rob the bank. App., *infra,* 5a. Nonetheless, the court ruled that the government did not prove that respondent had taken a substantial step toward the commission of the crime. Relying on its earlier decision in *United States* v. *Buffington, supra,*[4] the court held that

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[4] In *Buffington,* the defendants assembled the disguises and materials (including handguns) necessary to commit a robbery, they reconnoitered the site of the robbery, they twice slowly drove by the bank while staring into it, they left their vehicle armed, and they stood with their attention focused on the bank. 815 F.2d at 1301-1302; see App., *infra,* 6a-7a. The court found that conduct to be too "tentative and unfocused" to constitute a substantial step toward the commission

"[o]ur facts do not establish either actual movement toward the bank or actions that are analytically similar to such movement," which the court viewed as essential to proof of the crime of attempted bank robbery. App., *infra,* 7a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has erroneously decided a question of considerable importance to the enforcement of the federal bank robbery statute. The court of appeals ruled that a person must be "actual[ly] mov[ing]" toward a bank or must undertake steps that are "analytically similar to such movement" (App., *infra,* 7a) before he has committed attempted bank robbery, regardless of his proximity to the bank or other proof clearly demonstrating that a bank robbery is about to transpire. The decision below will effectively require law enforcement officers to avoid intercepting a suspect until he is virtually at the doorstep of a bank and has moved past the equivalent of his "last clear chance" to avoid what is always a dangerous and oftentimes a life-threatening crime.

1. The Ninth Circuit's construction of the attempt provision in the Bank Robbery Act, 18 U.S.C. (& Supp. IV) 2113(a), is inconsistent with the interpretation of that provision endorsed by four other circuits. Each of those circuits has parted company with the Ninth Circuit by holding that preparatory steps falling short of "actual movement" toward the bank or other functionally equivalent conduct are sufficient to constitute the substantial step toward completion of the crime that is necessary to support a conviction for attempted bank robbery.

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of a bank robbery, because "[n]ot only did [the defendants] not take a single step toward the bank, they displayed no weapons and no indication that they were about to make an entry." 815 F.2d at 1303.

Under the analysis employed by those courts, it is quite clear that respondent's conviction for attempted bank robbery would have been affirmed if his case had arisen in any of those circuits.

The Eighth Circuit in *United States* v. *Crawford,* 837 F.2d 339 (1988), upheld an attempted bank robbery conviction on facts that closely parallel the facts of this case. In *Crawford,* the defendant enlisted the aid of two accomplices; he reconnoitered the site of the bank; he obtained ski masks, gloves, coveralls, and a weapon for use in the robbery; and he had a confederate leave a car to be used in the robbery in a nearby church parking lot. On the morning of the robbery, the defendant was arrested in the parking lot when he attempted to start the car that had been left there overnight for use in the robbery. At the time of his arrest, the defendant was wearing the gloves and had the other equipment with him. 837 F.2d at 339-340. The Eighth Circuit ruled that the defendant's "acts clearly amounted to more than preliminary preparation," because, as in this case, the defendant "took steps directly aimed at the commission of a bank robbery and those steps corroborate the firmness of his criminal intent." *Id.* at 340. The court found that the defendant's actions "constitute[d] a substantial step in furtherance of [the] bank robbery," particularly in light of the fact that, as in this case, it was "the actions taken by the police, rather than the actions taken by [the defendant], [that] ended [his] robbery endeavor." *Ibid.*

Similarly, the Seventh Circuit in *United States* v. *Schramm,* 715 F.2d 1253 (1983), cert. denied, 466 U.S. 930 (1984), affirmed the defendant's attempted bank robbery conviction on the basis of evidence that he had rented a hotel room as a getaway headquarters and had assembled materials, such as a fake bomb, masks, and walkie-talkies, that were to be used in the robbery, even though the

defendant was arrested two miles from the bank while at the office of his parole officer. 715 F.2d at 1255. As the court explained, "[d]efendant's conduct was consistent with a genuine plan to rob the bank which was thwarted only by the F.B.I.'s premature arrest of [the defendant] before he got close to the bank." *Ibid.* (footnote omitted).

The Fourth Circuit in *United States* v. *McFadden,* 739 F.2d 149, cert. denied, 469 U.S. 920 (1984), upheld the defendants' convictions for two different attempted bank robberies, again without requiring that the evidence show that the defendants were on their "final approach" to the bank. In each case, the defendants discussed their plans, reconnoitered the banks, assembled weapons and disguises necessary for the crimes, and proceeded with a getaway car and driver to the vicinity of the bank. In each case, the defendants planned to hide near the bank and then enter it when the employees came to work in the morning, but in each case, their plans were interrupted when they spotted law enforcement officers in the area. 739 F.2d at 151. Even though the defendants had not left their final staging area to enter either bank, the court held that the defendants' conduct in each case was sufficient to support their convictions, because it reflected a firm intent to commit a robbery and constituted a substantial step toward the commission of that crime. *Id.* at 152.

Finally, in *United States* v. *Jackson,* 560 F.2d 112, cert. denied, 434 U.S. 941 (1977) and 434 U.S. 1017 (1978), the Second Circuit affirmed convictions on two counts of attempted bank robbery, based on the defendants' conduct on two separate occasions. On each occasion, the defendants "reconnoitered the place contemplated for the commission of the crime and possessed the paraphernalia to be employed in the commission of the crime—loaded sawed-off shotguns, extra shells, a toy revolver, handcuffs, and

masks—which was specially designed for such unlawful use and which could serve no lawful purpose under the circumstances." 560 F.2d at 120. The court ruled that the defendants' conduct "was sufficient as a matter of law to constitute a 'substantial step' if it strongly corroborated [the defendants'] purpose" (*ibid.*; citation omitted)), which the court found to be the case. Attempt liability, the court noted, "is designed to 'encourag[e] early police intervention where a suspect is clearly bent on the commission of a crime.' " *Id.* at 120-121 n.8 (citations omitted). The court determined that the evidence in that case was sufficient even though the defendants abandoned their goal on both occasions, once after deciding that the conditions inside the bank were not sufficiently favorable for a robbery and on the other occasion after detecting federal agents who were conducting surveillance. *Id.* at 115; see also *United States* v. *Stallworth*, 543 F.2d 1038 (2d Cir. 1976).

Respondent had proceeded at least as far with his preparations for entering the bank as the defendants in *Jackson*, and even farther than the defendants in *Crawford*, *Schramm*, and *McFadden*. At the time Officer Hensley interrupted him, respondent had parked approximately 200 feet from the bank; he had all of the equipment he needed to commit the robbery; his van was running in anticipation of approaching the drive-up window where the robbery was to take place; and he had just put on the blond wig that he planned to use as a disguise. Under the standard adopted by the Second, Fourth, Seventh, and Eighth Circuits, respondent's conduct was clearly sufficient to constitute an attempted bank robbery.

2. The rule adopted by the court of appeals—that a defendant must be actually or constructively moving toward a bank before he can be found guilty of attempted bank robbery, regardless of the strength of the other proof

that he was about to rob the bank—is clearly wrong. Respondent's actions were sufficient to constitute an attempted bank robbery under any reasonable interpretation of the Bank Robbery Act.

Neither the text nor the legislative history of the Act defines the elements of the crime of attempted bank robbery. Nor was there a single clear statement of the legal standard for attempt at common law.[5] Yet while common law courts used a variety of different verbal formulations to define an attempt, the formulations were all directed at the same end: to distinguish between "mere preparation" to commit a substantive crime, which is not punished as an attempt, and some additional step toward the commission of a substantive crime, which is. Rather than selecting among the competing common law formulations, federal courts applying the law of attempt have looked to the Model Penal Code, which has sought to refine the common law definitions of attempt by adopting a formulation that reflects the purposes that the law of attempt was designed to serve.[6]

The Model Penal Code requires an offender to take a "substantial step" toward the commission of the intended

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[5] See American Law Institute, Model Penal Code § 5.01 commentary at 38-47 (Tent. Draft No. 10, 1960) (discussing various formulations used by common law courts to characterize the kinds of steps necessary to constitute an attempt); Keedy, *Criminal Attempts at Common Law*, 102 U. Pa. L. Rev. 464, 474 (1954).

[6] There is no general federal "attempt" statute, and absent a specific attempt provision attached to a particular offense, attempts are not punishable under federal law. A number of federal criminal statutes, however, include specific attempt provisions. See, *e.g.*, 18 U.S.C. 81 (arson); 18 U.S.C. 112 (assaulting foreign officials); 18 U.S.C. 1113 (attempted murder or manslaughter); 18 U.S.C. (& Supp. IV) 2113 (bank robbery); 21 U.S.C. 846 (narcotics offenses); 21 U.S.C. 963 (narcotics importation offenses).

substantive crime that strongly corroborates the defendant's criminal purpose, but it does not demand that an offender undertake any particular act (such as actually moving toward a bank). See American Law Institute, Model Penal Code § 5.01(1)(c) and (2).[7] All of the court of appeals decisions cited above have adopted the Model Penal Code formulation as the best definition of attempt for purposes of the bank robbery statute. See *Crawford*, 837 F.2d at 340; *McFadden*, 739 F.2d at 151-152; *Schramm*, 715 F.2d at 1254-1255; *Jackson*, 560 F.2d at 117-121; *Stallworth*, 543 F.2d at 1040-1041. That formulation has also been endorsed by virtually every federal court of appeals in construing other federal statutes that prohibit attempts,[8] and by a considerable number of states as well.[9] Although the court of appeals in this case used lan-

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[7] For the convenience of the Court, Section 5.01 of the Model Penal Code (Proposed Official Draft 1962) is reproduced at App. D, *infra*, 14a-16a.

[8] See, *e.g.*, *United States* v. *Dworken*, No. 87-1354 (1st Cir. Aug. 29, 1988), slip op. 8-26 (21 U.S.C. 846); *United States* v. *Mims*, 812 F.2d 1068, 1077 (8th Cir. 1987) (21 U.S.C. 843); *United States* v. *Rovetuso*, 768 F.2d 809, 821 (7th Cir. 1985), cert. denied, 474 U.S. 1076 (1986) (18 U.S.C. 1512(a)(2)(A)); *United States* v. *Johnson*, 767 F.2d 673, 675 (10th Cir. 1985) (21 U.S.C. 846); *United States* v. *McDowell*, 705 F.2d 426, 427-428 (11th Cir. 1983) (same); *United States* v. *Williams*, 704 F.2d 315, 321 (6th Cir.), cert. denied, 464 U.S. 991 (1983) (same); *United States* v. *Rivera-Sola*, 713 F.2d 866, 869 (1st Cir. 1983) (same); *United States* v. *Bunney*, 705 F.2d 378, 381 (10th Cir. 1983) (18 U.S.C. 844(i)); *United States* v. *Ivic*, 700 F.2d 51 (2d Cir. 1983) (same); *United States* v. *Joyce*, 693 F.2d 838, 841 (8th Cir. 1982) (21 U.S.C. 846); *United States* v. *Mowad*, 641 F.2d 1067, 1073 (2d Cir.), cert. denied, 454 U.S. 817 (1981) (22 U.S.C. 2778(c)); *United States* v. *Manley*, 632 F.2d 978, 987 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981) (21 U.S.C. 846); *United States* v. *Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975) (same).

[9] The majority of state legislatures that have recodified their criminal codes since the Model Penal Code was promulgated, and

guage similar to that endorsed by the Model Penal Code (see App., *infra*, 4a), the court departed from that test by construing the "substantial step" element to require proof of movement toward the bank or some functional equivalent, a requirement that is not part of the Model Penal Code formulation and has not been adopted by any court that employs that test.

Respondent's actions clearly constituted a substantial step toward the robbery of the bank that strongly corroborated his illegal purpose. When the police approached respondent in the shopping center parking lot across from the bank, respondent had in his van a fake bomb, several demand notes, a police scanner radio tuned to the local police frequency, a notebook containing the FBI radio frequency and that of another local police department, a wig, and several other items (including the stolen van itself) that would be useful for making a getaway. Respondent therefore was in possession of materials to be employed in the commission of the crime, and those materials could have served no lawful purpose in the circumstances. See Model Penal Code § 5.01(2)(e). Respondent's possession of those items strongly corroborated his intent to rob the Security Pacific Bank, because the possession of such items is one of the "preliminary steps" to a robbery that is "uniquely criminal and generally incompatible with innocent purpose." *United States* v. *Manley*, 632 F.2d 978, 989 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981). Accord *United States* v. *Rivera-Sola*, 713 F.2d 866, 870 (1st Cir. 1983). And any doubt on that score was eliminated by respondent's post-arrest admissions that he was about to

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several state courts of last resort, have adopted the Model Penal Code formulation. See G. Fletcher, *Rethinking Criminal Law* § 3.3, at 169 (1978); 2 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 6.2, at 36-37 (1986).

embark on a bank robbery. The fact that his plans were interrupted before he left a nearby staging area, rather than while he was en route to the bank, does not render the steps he took any less "substantial."

The court of appeals' rule is not responsive to the rationale for the law of criminal attempts. Attempts are punished as a crime because of the great need to stop offenses from occurring and to punish persons who take steps to commit a substantive crime, even if those steps ultimately prove unsuccessful.[10] The court of appeals' rule, however, does not reflect either a defendant's culpability or society's need to prevent a crime from occurring. A person may fully and concretely formulate an unalterable design to commit a bank robbery even though he has not yet left a nearby staging area. Likewise, a robbery may be only moments away even though the robber has not yet begun to assault the bank. In such cases, society should be free to intervene in order not only to stop a crime from coming to pass, but also to punish the defendant for putting innocent parties at risk of the loss of their property, serious injury, or death.

This case proves that point. Driving to the teller's window and placing the fake bomb and demand note on the glass would have taken respondent less than a minute. Only Officer Hensley's arrival prevented a robbery from occurring, and that fortuity ought not to be an exculpating factor. The court of appeals' rule is therefore arbitrary because it is unrelated to the purposes that are served by the

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[10] See, *e.g.*, *United States* v. *Dworken*, slip op. 11 n.4 (citation omitted) ("We agree that 'the only rational function of the law of attempts must be the identification of individuals whose overt behavior manifests dangerous criminal propensities.' "); *United States* v. *Stallworth*, 543 F.2d at 1040-1041; 2 W. LaFave & A. Scott, Jr., *supra*, § 6.2, at 22.

crime of attempt. In fact, the poverty of the court's rule is best illustrated by the fact that respondent would have been guilty of attempted bank robbery under the Ninth Circuit's rule if he had been stopped while he was driving toward the shopping center—even if he had just pulled out of a driveway miles from the bank—because he would have been "actual[ly] mov[ing]" toward the bank at that time. That respondent chose to complete a few last-minute steps in a parking lot a few hundred feet from the bank rather than at home should not exculpate him for having come perilously close to completing his clearly intended course of action.

3. The question in this case is of considerable practical importance. The Ninth Circuit in this case and in *Buffington* has now adopted a rule that effectively forces law enforcement officers to wait until a bank robbery suspect enters a bank or is en route to it before intercepting him and halting a bank robbery. That procedure needlessly puts at risk the lives of innocent bank customers, employees, law enforcement officials, and even the robbers themselves. It is not uncommon for law enforcement officers to learn in advance that a robbery is about to occur, either from an informant in the robbers' camp or from a citizen's tip, as in this case. In that significant class of cases, the officers must often decide how long to wait before arresting the robbers. The Ninth Circuit's rule places officers in the difficult position of having to decide whether to wait until the robbers enter or move toward the bank—with the attendant risks of injury—or to arrest the robbers at an earlier point, when the arrest can be effected with a minimum of risk of injury, but at a point at which the robbers may be immune from prosecution for the attempted bank robbery. In addition, the Ninth Circuit rule enables defendants who are engaged in a bank robbery to go free if they are lucky enough to spot surveillance officers in the

vicinity before they begin their final approach to the bank. Such a rule is not consistent with the purposes of either the attempt doctrine or federal criminal law in general.

Moreover, the number of cases in which that rule could have an effect is quite large. In 1987, according to FBI statistics, approximately 44 percent of all robberies of federally insured financial institutions occurred in states within the jurisdiction of the Ninth Circuit (2689 of 6078 bank robberies). The Ninth Circuit's rule, if allowed to stand, will therefore have a serious and adverse effect on an important area of federal law enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
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OCTOBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1195
D.C. No. CR-S-85-238-TJM

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

REGINALD DEAN STILL, DEFENDANT/APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
Thomas J. MacBride, District Judge, Presiding

Argued and Submitted
November 10, 1987—San Francisco, California

Order and Opinion Filed July 1, 1988

ORDER AND OPINION

Before: MARY M. SCHROEDER, HARRY PREGERSON and MELVIN BRUNETTI, Circuit Judges.

Opinion by Judge Brunetti

ORDER

The Opinion filed January 25, 1988, 837 F.2d 871 (9th Cir. 1988) is withdrawn. The attached Opinion shall be filed.

OPINION

BRUNETTI, Circuit Judge:

Reginald Dean Still was indicted and convicted of attempted bank robbery of Security Pacific National Bank, pursuant to 18 U.S.C. § 2113(a)[1] and for interstate transportation of a stolen van, pursuant to 18 U.S.C. § 2312.

Still appeals from the judgment of conviction, contending that the government failed to establish every element of attempted bank robbery beyond a reasonable doubt. Based on this circuit's recent decision in *United States v. Buffington*, 815 F.2d 1292 (9th Cir. 1987), we reverse the conviction of attempted bank robbery and affirm the conviction for interstate transportation of a stolen vehicle.

FACTS

On August 7, 1985, at about 10:30 a.m., a lay witness saw the defendant putting on a long blonde wig while sit-

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[1] Title 18 of the United States Code, § 2113(a) provides:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

ting in a van with the motor running, parked in the Roseville Square Shopping Center. The van was parked approximately 200 feet away from the Security Pacific Bank. The witness notified the police, who arrived in a marked patrol car shortly thereafter. Upon arrival of the police, the defendant put the van in reverse, and drove off. The police caught up with the defendant, who had fled to a nearby camper/trailer. He was arrested for possession of stolen property and taken to the Roseville Police Department.

Following his arrest, the defendant allegedly volunteered the following statements: "You did a good job. You caught me five minutes before I was going to rob a bank. That's what I was putting the wig on for." "The van is stolen. How much do you get for auto theft around here?"

After waiving his Miranda rights, the defendant told the police that he was planning to rob a bank when the marked police vehicle came up to the van he was in. He planned to drive up to the drive-in window of the bank and place a phony bomb, along with a demand note, on the window. The defendant did not specify, by name, the bank he was planning to rob. He described it as a large, two-story building, made of brown or reddish brick. The defendant stated that Security Pacific sounded like the name of the bank he intended to rob. Of the thirty-nine banks within five miles of the Roseville Square Shopping Center, only Security Pacific fits the defendant's description of the bank he was planning to rob.

The defendant told the police that his statements were just "frosting on the cake" because all of the evidence that they needed was located in the van. Inside the van, the police found a hoax bomb which looked like a real bomb, a red pouch with a demand note taped to it, a long blonde wig, a police scanner programmed to the Roseville Police

Department, and a notebook containing drafts of demand notes and the radio frequency of the Rocklin Police Department.

STANDARD OF REVIEW

Still claims that the evidence is not sufficient to support his conviction for attempted bank robbery. We review the evidence, "in the light most favorable to the prosecution and to the verdicts," *United States v. Hughes*, 626 F.2d 619, 626 (9th Cir.), *cert. denied*, 449 U.S. 1065 (1980), to see if "any rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Lester*, 749 F.2d 1288, 1296 (9th Cir. 1984).

ANALYSIS

A conviction for an attempt requires proof of both "culpable intent" and "conduct constituting a substantial step toward commission of the crime that is in pursuit of that intent." *United States v. Buffington*, 815 F.2d at 1301; *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980), *cert. denied*, 450 U.S. 957 (1981). A "substantial step" is "conduct strongly corroborative of the firmness of the defendant's criminal intent." *United States v. Buffington*, supra; *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975). "Culpable intent" can be inferred from a particular defendant's conduct and from the surrounding circumstances. *United States v. Buffington*, 815 F.2d at 1302.

In *United States v. Buffington*, supra, this court concluded no rational fact finder could find sufficient evidence of the culpable intent necessary to sustain the conviction for attempted bank robbery. In *Buffington*,

the government presented the following evidence to establish the defendant's intent to rob a particular bank: assemblage and possession of materials necessary to commit the crime, including two handguns, female clothing and a makeup disguise for one defendant, and a multilayered clothing disguise for another defendant; two visits to the location before the attempt; actions to carry out the plan, including driving by the bank twice while staring into it, driving to the rear of the bank, one of the defendants staring out of the window of a nearby store toward the bank, and two of the defendants leaving their vehicle armed and standing with their attention directed toward the bank.

This court concluded that the above evidence did not establish the requisite intent because these actions could just as easily indicate an intent to rob another nearby bank or store. The court stated that the fact no defendant came within 50 yards of the bank could produce no more than a suspicion that they intended to rob that particular bank.

However, the court went on to state that there could be sufficient evidence of the requisite intent without actual entry, citing with approval *Rumfelt v. United States*, 445 F.2d 134 (7th Cir.), *cert. denied*, 404 U.S. 853 (1971). In *Rumfelt*, the defendant's presence in front of the bank with a ski mask, plus his use of a rifle to intimidate a passerby into trying to open the bank door for him established the requisite intent. The *Buffington* court also stated that a defendant's intent to steal could be inferred from statements of co-conspirators or informants, statements which were excluded in *Buffington*.

In this case, Still's intent to rob the Security Pacific National Bank was clearly established in his statements to the police after his arrest. Without prompting, the defendant stated: "You did a good job. You caught me five minutes

before I was going to rob a bank. That's what I was putting the wig on for." After waiving his rights, the defendant stated he intended to use the drive-up window of the bank and place a phony explosive device, along with a note, on that window, to rob a bank. Although the defendant did not state the name of the bank he was planning to rob, he did describe it. Within a five mile area, his description of a large, two-story bank, constructed of brown or reddish color brick fits only the Security Pacific Bank. Additionally, when asked by the police if it was Security Pacific that the defendant intended to rob, he said that Security Pacific sounded like the name of the bank he was going to rob. These statements permit an inference of an unequivocal intent to rob the Security Pacific Bank. Therefore, the first aspect of an attempt, a culpable intent, was established beyond a reasonable doubt.

To establish the second aspect of an attempt, "a substantial step," more than mere preparation must be shown. *United States v. Taylor*, 716 F.2d 701, 712 (9th Cir. 1983). "[T]here must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature." *United States v. Buffington*, 815 F.2d at 1302, citing with approval *United States v. Mandujano*, 499 F.2d at 376.

In *Buffington*, the court concluded that the defendants' conduct did not cross the line between preparation and attempt. Although the defendants had assembled the disguises and materials necessary to commit the robbery, drove by the bank twice while staring into it, and left their vehicle, armed, and stood with their attention focused on the bank, the court emphasized that none of them made any move toward the bank. Thus, standing alone, the de-

fendants' conduct was too tentative and unfocused to constitute either the requisite "appreciable fragment" of a bank robbery, or a step toward the commission of the crime of such substantiality that, unless frustrated, the crime would have occurred. *United States v. Buffington*, 815 F.2d at 1303.

The *Buffington* court stopped short of expressly requiring some actual movement toward the bank to show a substantial step toward an attempt. They cited *United States v. Snell*, supra, with approval, where this circuit upheld a conviction for attempted robbery without actual movement toward the bank, reasoning that the defendants' entry into the victim's home was analytically similar to entry into a bank.

Our facts do not establish either actual movement toward the bank or actions that are analytically similar to such movement. Before he was apprehended by the police, Still was seen sitting in his van, with the motor running, wearing a long blond wig, parked approximately 200 feet away from the Security Pacific National Bank. Considering that the *Buffington* defendants' actions went further in manifesting a substantial step than did Still's actions, *Buffington* compels the conclusion that proof of a substantial step toward the attempt was not established beyond a reasonable doubt.

While Still appealed the judgment of conviction, he did not contest the conviction for interstate transportation of a stolen van pursuant to 18 U.S.C. § 2312 and we affirm that conviction.

The district court sentenced Still to a fifteen year term on the conviction of attempted bank robbery, suspended imposition of the sentence on the conviction of interstate transportation of a stolen vehicle and placed Still on five years probation to commence on the expiration of the

sentence for attempted bank robbery. It appears that the district court judge attempted to structure a sentence of custody and probation based upon the two convictions and now that the bank robbery conviction has been reversed the district court should be allowed to reconsider the sentencing on the stolen vehicle conviction. *United States v. Hagler*, 709 F.2d 578, 579 (9th Cir.), *cert. denied*, 464 U.S. 917 (1983). We remand this case to the district court for resentencing.

REVERSED IN PART, AFFIRMED IN PART, REMANDED FOR RESENTENCING.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1195
D.C. No. CR-S-85-238-TJM

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

REGINALD DEAN STILL, DEFENDANT/APPELLANT

[Filed July 6, 1988]

ORDER

Before: SCHROEDER, PREGERSON and BRUNETTI, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1195
D.C. No. CR-S-85-238-TJM

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

REGINALD DEAN STILL, DEFENDANT/APPELLANT

Filed September 20, 1988

ORDER

Before: MARY M. SCHROEDER, HARRY PREGERSON and MELVIN BRUNETTI, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

In reviewing jury instructions, "a single instruction to a jury may not be viewed in artificial isolation, but must be viewed in the context of the overall charge." *United States v. Abushi*, 682 F.2d 1289, 1299 (9th Cir. 1982), quoting *United States v. Park*, 421 U.S. 658, 674 (1975). We give the trial judge "substantial latitude" so long as the instructions "fairly and adequately cover the issues presented." *United States v. Abushi*, 682 F.2d at 1299. Because Still neither objected to the court's instruction on clear and convincing evidence when given the opportunity to do so,

nor offered a definition of clear and convincing evidence in his proposed instructions, we review the instructions given under the "plain error" standard. *United States v. Bustillo*, 789 F.2d 1364, 1367 (9th Cir. 1986). "Reversal of a criminal conviction on the basis of plain error is an exceptional remedy, which we invoke only when it appears necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process." *Id.*; *United States v. Paris*, 827 F.2d 395, 398 (9th Cir. 1987).

Here, the alleged "plain error" is an omission from the jury instructions which rendered them misleading. However "an improper instruction rarely justifies a finding of plain error." *United States v. Glickman*, 604 F.2d 625, 632 (9th Cir. 1979), *cert. denied*, 444 U.S. 1080 (1980). Additionally, "it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibe*, 431 U.S. 145, 154 (1976).

In this case, the context and language of the overall charge indicates there has been no miscarriage of justice. As in *Henderson v. Kibe*, supra, where the Supreme Court concluded that there was no plain error when the trial court failed to give any explanation of causation beyond the reading of the statute itself, we conclude that the court's reading of the statutory language regarding the definition of insanity and the defendant's burden of proof of clear and convincing evidence does not demonstrate plain error.

Additionally, the trial court's instructions contrasted the differences between the government's burden of proof and the defendant's burden of proof:

> Bear in mind that in a criminal case the burden of proof is on the government to prove each element of the case beyond a reasonable doubt; but if a defendant

raises the issue of insanity, the burden of proof on that issue and that issue alone is on the defendant and to prevail on that defense he must show insanity as defined in these instructions by clear and convincing evidence.

Finally, the court's instructions conformed almost entirely with federal model jury instructions. *See* 1 E.Devitt, C. Blackmar and M. Wolff, *Federal Jury Practice and Instructions* § 14.17, p. 307 (3d ed. 1987 supp.); *Manual of Model Jury Instructions for the Ninth Circuit* § 6.03, p. 93 (1985). The comments following the Devitt and Blackmar instruction state "no definition of clear and convincing evidence is included. It appears that the term has not usually been defined when used in jury instructions, as in libel cases." Due to the absence of such a definition in the model instructions and the context and language of the trial court's overall charge, we cannot conclude that the district court committed plain error.

The district court's refusal to permit the County Jail psychiatrist to testify does not constitute reversible error. The trial court has broad discretion when determining whether to admit or exclude expert testimony and we will reverse only if the decision is "manifestly erroneous." *United States v. Gann*, 732 F.2d 714, 724 (9th Cir.), *cert. denied*, 469 U.S. 1034 (1984). Still's stated sole purpose for offering the testimony of the County Jail psychiatrist was to establish that the doctor had been prescribing Still antipsychotic medications for a particular purpose and for a particular time. However, the court permitted the government's expert witness to testify to this same information and instructed Still that the court would consider granting a request from him to bring the county psychiatrist back for rebuttal if Still was dissatisfied with the testimony of the government's expert witness. The court also expressed

a concern that by admitting the county psychiatrist's testimony, the court might be interfering with the treatment of prisoners in jails because prisoners might ask for more drugs to create the impression that they need more drugs. Considering the potential for interference with the proper treatment of prisoners and the admission of essentially the same testimony, we conclude that the trial court's decision to exclude the county psychiatrist's testimony was not manifestly erroneous.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

Section 5.01 of the Model Penal Code (Proposed Official Draft 1962) provides as follows:

(1) *Definition of Attempt.* A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) *Conduct Which May Be Held A Substantial Step Under Subsection (1)(c).* Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place complated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances.

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) *Conduct Designed to Aid Another in Commission of a Crime.* A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) *Renunciation of Criminal Purpose.* When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, af-

fect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

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ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner,

NO. 88-581

v.

REGINALD DEAN STILL,

Respondent.

_____/

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT REGINALD DEAN STILL

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QUESTION PRESENTED FOR REVIEW

Has the government proved every element of attempted bank robbery when it has established no more than the defendant's confession he intended to rob some unspecified bank, his possession of a disguise, a hoax bomb and a demand note and his presence near several banks and retail establishments?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner, NO. 88-581

v.

REGINALD DEAN STILL,

Respondent.

_____/

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The United States (the Government) seeks review of a decision by the United States Court of Appeals for the Ninth Circuit reversing the attempted bank robbery conviction of Respondent Reginald Dean Still (STILL). The Ninth Circuit found no evidence STILL took a "substantial step" toward committing a bank robbery and, accordingly, no basis for upholding a conviction of attempted bank robbery.

The Government argues the Ninth Circuit's standard for determining if the defendant has taken a "substantial step" toward committing a bank robbery differs from that of four other circuits. The posited conflict does not exist. The Ninth Circuit applied the same standard utilized in the other circuits to a unique set of facts. Even assuming its conclusion differs from that another circuit would reach if faced with these same facts, this hypothetical difference in result within such a fact-specific context does not merit review here. Finally, the Ninth Circuit did not reach questions STILL presented which would require reversal of his conviction regardless of this Court's resolution of the issue the Government raises.

The petition for a writ of certiorari should be denied.

OPINIONS BELOW

A revised opinion of the court of appeals is reported at 850 F.2d 607; its initial opinion at 837 F.2d 871. Their resolution of the issue presented in the petition does not differ.

JURISDICTION AND RELEVANT STATUTES

This Court's jurisdiction, 28 U.S.C. §1254(1), and the Government's identification of the statute involved in this petition, 18 U.S.C. §2113(a), are uncontested.

STATEMENT OF FACTS[1]

On August 7, 1985, Kelli Ross went shopping at the Roseville Square Shopping Center (the Shopping Center) in Roseville, California. The Shopping Center contains a Safeway Grocery Store, Richardson's Clothing Store, Firestone Tire Center, Security Pacific Bank, a pizza parlor, an attorney's office, a book store and various other storefront operations. RT 61-62. As Ross walked toward a store at approximately 10:30 a.m., STILL walked past her and got into the passenger side of a van parked next to her vehicle. The van was parked several hundred feet away from the Security Pacific Bank. A short time later, Ms. Ross returned to her vehicle. As she approached, she observed STILL in the passenger side of the van putting on a blonde wig. RT 3-12. Fearing STILL might be a rapist, she telephoned the police. RT 21-24.

Officer Hensley of the Roseville Police Department was dispatched to the shopping center parking lot in response to Ms. Ross's call. Hensley was told a bald-headed man was in a van putting on a wig. He was not given the license plate number of the van. RT 64-68. Hensley parked his marked patrol vehicle facing the front of the van. He saw STILL emerge from the rear interior of the van, sit down in the driver's seat, place the vehicle in reverse and drive off. RT

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[1]The statement of facts presented by the Government in the petition is accurate though incomplete. A more extensive statement of facts is set forth here to better demonstrate the Government failed to introduce evidence STILL took a "substantial step" toward robbing a particular bank.

33-37. There was nothing remarkable in how STILL exited the parking space and drove away. RT 66-67.

Officer Hensley followed the van, activating his red lights and siren before it left the Shopping Center parking lot. Although he gave chase, Hensley then lost sight of the van. The abandoned van was later found parked between two houses. RT 39-43. Other officers arrived at the scene and a neighborhood search began. STILL was found inside the shower of a self-contained camper/trailer which was parked in a nearby backyard. RT 52-54. STILL was placed under arrest for possession of stolen property. Hensley believed that, prior to placing STILL under arrest, he had learned that the license plates on the van did not belong to the van. STILL was not advised of the reason for his arrest until he arrived at the police station. RT 72-73.

While in custody and waiting to be booked, STILL allegedly volunteered "You did a good job. You caught me five minutes before I was going to rob a bank. That's what I was putting the wig on for." After the booking process was complete, STILL allegedly stated: "The van is stolen. How much do you get for auto theft around here?" RT 58.

Detective Stump of the Roseville Police Department then advised STILL of his Miranda rights, had him sign a written waiver and interrogated him. According to Detective Stump, STILL said he was preparing to rob an unspecified bank when a marked police vehicle approached his van. STILL allegedly indicated he planned to place a phony explosive device along with a note in the drive up window of the bank. STILL described the bank as a large, two-story bank made of brown or reddish-color brick. RT 85-86. Thirty-nine banks are located within five miles of the Shopping Center parking lot, five of these within a thousand yards of STILL's van. RT 147.

A search of STILL's van uncovered a hoax bomb, a folder containing a typed and handwritten note, a demand note, a crumpled demand note, a blonde wig, a police scanner, a scanner guide, a seven page bomb extortion note for a hotel,

and two plastic boxes containing electronic parts. On the driver's side floorboard were sketches of the Citizen's Bank of Roseville and a Del Taco Restaurant. RT 94, 96, 101, 157, 98, 100, 160, 161, 164, 199-202. Both the police scanner and the hotel extortion note were found in the rear of the van. RT 193 & 201.

Later that day, STILL allegedly made further incriminating statements to Agent Maples of the United States Secret Service and Agent White of the F.B.I. STILL purportedly said he stole the van, planned to rob the bank and tried to elude the police. RT 206-212, 232. The agents were allegedly told STILL planned to place a hoax bomb on the drive up window of the bank and use a note to demand money from the teller. STILL also supposedly explained to Agent Maples how the van was stolen in Missouri during July of 1985. Rt 214.

After his arrest, Dr. Globus conducted two psychiatric examinations of STILL and diagnosed him as a chronic paranoid schizophrenic. RT 503-506.

STATEMENT OF THE CASE

STILL was charged with the attempted robbery of the Security Pacific Bank and interstate transportation of a stolen van from Jefferson, Missouri to Roseville, California.

At trial, the Government introduced the following items found in STILL's van: the hoax bomb, a demand note, a memo book with draft demand notes, a crumpled demand note, a blonde wig, a police scanner, a map of Citizen's Bank[2], a scanner guide, a plastic tool box with timer, a plastic tool box containing transistors, a county map, a board for making driver's licenses, and nine fake driver's licenses. Several law enforcement officers testified to STILL's statements concerning his preparations to rob a bank.

To establish STILL's long-standing psychiatric disorders, two psychiatrists, a social service counselor, an attorney and two lay witnesses were called and testified as to STILL's mental state as far back as 1971. Dr. Globus testified to his

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[2]STILL was, of course, charged with attempting to rob Security Pacific Bank, not Citizen's Bank.

conclusion that STILL suffered from paranoid schizophrenia. This testimony was contradicted by two rebuttal experts in psychiatry offered by the government.

The jury found STILL guilty on both counts of the indictment. The Court sentenced STILL to fifteen years for the attempted bank robbery and five years probation on the stolen vehicle charge. The Court recommended STILL receive psychiatric assistance and treatment while in custody.

The Ninth Circuit found no evidence of a "substantial step" toward the robbery of the Security Pacific Bank, reversed STILL's conviction for attempted bank robbery and affirmed his conviction for transportation of a stolen vehicle. The Government's petition for rehearing on the attempt issue was denied. STILL's petition for rehearing on the sanity issue was denied.

ARGUMENT

A. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS

The Government relies on four cases to establish the Ninth Circuit's analysis of attempt issues is inconsistent with the standard applied to attempted bank robbery in four other circuits. Petition at 8-10.

The Ninth Circuit follows the attempt analysis formulated by the Fifth Circuit in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). See United States v. Still, 850 F.2d 607, 608 (9th Cir. 1988); United States v. Buffington, 815 F.2d 1292, 1301 (9th Cir. 1987). Two of the cases cited by the Government as conflicting with the Ninth Circuit's analysis specifically follow Mandujano. See United States v. Jackson, 560 F.2d 112, 117 (2d Cir.), cert. denied, 434 U.S. 941 (1977); United States v. McFadden, 739 F.2d 149, 152 (4th Cir.), cert. denied, 469 U.S. 920 (1984).

The Court in Mandujano held that an attempt required proof of: (1) the "culpability otherwise required for the commission of the crime which he is charged with attempting;" and (2) "conduct which constitutes a substantial step toward

commission of the crime." 499 F.2d at 376. The conduct must be "strongly corroborative of the firmness of the defendant's criminal intent." Id. The Court in Mandujano considered its formulation "generally consistent with and our language is in fact close to the definitions proposed by the ... American Law Institute's Model Penal Code." Mandujano, 499 F.2d at 377 n.6. Accordingly, the Ninth Circuit, which follows Mandujano, does not (as the Government insists) reject the Model Penal Code formulation for attempt.

The Eight Circuit case cited by the Government as inconsistent with the Ninth Circuit, United States v. Crawford, relies upon earlier circuit precedent for its attempt analysis. 837 F.2d 339, 340 (8th Cir. 1988)(citing United States v. Mims, 812 F.2d 1068 (8th Cir. 1987)). Mims in turn relied upon earlier Eighth and Tenth Circuit precedent. 812 F.2d at 1077 (citing United States v. Joyce, 693 F.2d 838 (8th Cir. 1982) & 1078 (citing United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979)). Both Joyce and Monholland squarely derive their analysis from Mandujano. 693 F.2d at 841 (citing Mandujano) & 607 F.2d at 1319-20 (citing Mandujano). While the road is tortuous, it is clear the Eight Circuit applies the same test to attempts as the Ninth Circuit.

The Seventh Circuit case cited by the Government follows a case decided before Mandujano. See United States v. Schramm, 715 F.2d 1253, 1254 (7th Cir. 1983), cert. denied, 466 U.S. 930 (1984) (citing Rumfelt v. United States, 445 F.2d 134 (7th Cir. 1971)). Although decided four years before Mandujano, Rumfelt relies upon the same authority, e.g., United States v. Baker, 129 F.Supp. 684 (S.D.Cal. 1955) & People v. Buffum, 40 Cal.2d 709 (1953), to formulate a nearly identical standard. Compare Rumfelt, 445 F.2d at 136 ("'there must be some appreciable fragment of the crime committed .... the act must not be equivocal in nature,'" quoting Buffum at 718) with Mandujano at 376-77 (identical quote). The Ninth Circuit has cited Rumfelt with approval. See Buffington, 815

F.2d at 1302. In short, the four circuit cases cited by the Government as well as the Ninth Circuit apply identical or nearly identical tests to attempt issues.

What the Government is really saying is that it disagrees with the results the Ninth Circuit produces when it applies the Mandujano/Model Penal Code test. Rather than admit to this weak position, the Government has instead argued the Ninth Circuit utilizes a different test. Applying the Mandujano/Model Penal Code test, the cases cited by the Government are clearly distinguishable from that of STILL.

B. THE STANDARD GOVERNING ATTEMPTS APPLIED BY THE FIVE CIRCUITS YIELDS IDENTICAL RESULTS WHEN PROPERLY ANALYZED

The overriding distinction between the four cases cited by the Government and this case is the evidence of criminal conduct directed toward a specific bank in each of the four. The conduct of the defendants in those four cases "cross[ed] the boundary between preparation and attempt." United States v. Buffington, 815 F.2d at 1303.

In Crawford, the government introduced evidence obtained from a confidential informant, a co-conspirator in the planned robbery, that the defendants' acts were directed toward a specific bank. 837 F.2d at 339. The "getaway" room where the paraphernalia to be used in the robbery in Schramm were stored was located in the same building as the target bank. 715 F.2d at 1255. The defendants in McFadden were captured on tape admitting a series of robberies of branch banks in isolated areas. 739 F.2d at 150-51. The attempt was in the vicinity of a similarly isolated fourth branch bank. Id. at 151. The defendants in Jackson were infiltrated by an informant who testified to two separate attempts directed to the same bank. 560 F.2d at 114-116.

In contrast, while the Ninth Circuit found evidence STILL intended to rob the Security Pacific Bank, there was no conduct specifically directed toward that bank. As noted above, STILL sat within five miles of thirty-nine banks and within one thousand yards of five banks. There were numerous

other retail establishment in similarly proximity. Without either movement or the equivalent of movement toward the Security Pacific Bank, there was no conduct directed toward the robbery of that particular bank. "[U]ntil the corroborative step is taken, there is insufficient indication, or proof, that the actor would actually follow through on a criminal design, even if that design has been affirmatively expressed." United States v. Dworkin, 855 F.2d 12, 17 n.3 (1st Cir. 1988). Until such focused conduct, there was no unequivocal "substantial step" taken toward robbing that particular bank. There was no fragment of the robbery of that particular bank.

For example, if STILL were accused of attempting to board an airline flight without a ticket, evidence he went to the airport, did not buy a ticket and sat in the waiting area would not suffice to convict him. The Government would be required to prove he made some movement toward boarding a particular plane or the equivalent of such movement (threatening a ticket agent, for example). Unfocused conduct, regardless of specific intent to accomplish a crime, is not an attempt to commit that crime.

C. ASSUMING THE NINTH CIRCUIT IMPROPERLY APPLIED THE STANDARD GOVERNING ATTEMPTS, THIS ISOLATED ERROR DOES NOT MERIT THE GRANTING OF THE GOVERNMENT'S PETITION

This Court does not sit to correct isolated instances of error in the application of a proper legal standard. See, e.g., Ross v. Moffitt, 417 U.S. 600, 616-17 (1974); Stern, Gressman & Shapiro, Supreme Court Practice 217-20 & 221-24 (1986 ed.). As noted above, the Ninth Circuit's standard for analyzing attempts is the same as that applied in four other circuits. Since the standard applied is proper, its misapplication to these facts, if it occurred, is not grounds to grant review.

D. THERE IS NO POLICY REASON TO GRANT REVIEW IN THIS CASE

The Government argues the Ninth Circuit's approach to attempted bank robbery forces law enforcement officials to

wait until the potential robbers are in close physical proximity to the target bank before intercepting them. This forced decision to wait until the potential robbers are "near" the bank will supposedly lead to greater danger to the public. The Government's argument not only misstates the Ninth Circuit's approach but confuses the question of when law enforcement can arrest a suspect with when that suspect commits the crime of attempt.

As noted above, the Ninth Circuit's approach does not require physical proximity, instead it (like the other circuits) requires some unequivocal conduct directed toward the criminal objective. If, as posited by the Government, law enforcement knows certain individuals are to rob a particular bank (through an informant or otherwise), there is evidence to demonstrate the defendants' conduct is directed toward a criminal goal without physical proximity. An arrest is proper and an attempt has occurred.

In STILL's case, his conduct was no doubt suspicious enough to merit police inquiry, if not arrest. At the time he was arrested, however, he had not attempted to commit a crime. Certainly no one had been endangered by STILL's overt act of placing a long blonde wig on his head. Likewise, that act did not demonstrate an unequivocal intent to rob a bank or anything else for that matter. While persons brandishing firearms or otherwise threatening others can be arrested for that fact alone, the citizen who harbors thoughts of bank robbery but who takes no substantial step toward converting those thoughts to reality has not endangered anyone. More importantly, a person harboring evil thoughts which he has not converted into evil acts has committed no crime.

The Government's "practical" policy argument would not only allow the arrest of persons who had taken no substantial step toward committing a crime but would convict them of an attempt to commit a crime. This "practical" policy would punish as a criminal attempt "thinking about robbing a bank." Under such a policy, a great many of us are criminals.

E. WERE THE COURT TO GRANT REVIEW, THE JUDGMENT BELOW WOULD NONETHELESS BE AFFIRMED ON GROUNDS THE NINTH CIRCUIT DID NOT REACH

The Ninth Circuit never reached the question of whether STILL's conduct ever rose to the level of "attempted" bank robbery by "force, violence or intimidation." Were this Court to grant the petition and remand for application of a different standard governing attempts, the result would not change for the Ninth Circuit would STILL be required to reverse for insufficiency of the evidence on another ground.

18 U.S.C. §2113 reads in relevant part:

> "(a) whomever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association. . ."
> (Emphasis added.)

In United States v. Baker, 129 F.Supp. 684, 686 (S.D. Cal. 1955), the Court examined the language above and stated that "the attempt relates to the taking and not to the intimidation. Thus, what is involved in this indictment is an attempted taking by intimidation, the means being intimidation, or putting in fear instead of by force." (Emphasis added).

In Baker, supra, the defendant had passed a note to the bank teller who later testified as being nervous though she had herself scared off the defendant before he received any money. The Baker Court held that in a prosecution for attempted bank robbery, when no force is used, the only determination is:

> "Whether the defendant did knowingly and willfully by intimidation attempt to take from the person or presence of another money in the care, custody and control of a bank whose deposits are insured by the Federal Deposit Insurance Corporation."

In the present case, there was no force, no threats and no intimidation. Intimidation "must be established by proof of conduct, words, or circumstances reasonably calculated to produce fear." United States v. Baker, supra, at 686. At no

time did STILL ever attempt to confront anyone, let alone attempt to take anything by force and violence from the Security Pacific Bank. No one from the bank ever saw STILL. In fact, the lay witness who contacted the police based on what she considered to be STILL's suspicious behavior, felt he might be a rapist, not a bank robber. The officer who arrived on the scene and ultimately arrested STILL arrested him for possession of stolen property, not attempted bank robbery. It is abundantly clear that no one observing STILL's conduct was at any time intimidated or even thought that he was about to rob a bank, let alone the Security Pacific Bank.

No circuit has apparently addressed whether force and violence or intimidation must be established in order to sustain a conviction for attempted bank robbery pursuant to Title 18 U.S.C. §2113(a). In construing a statute in the case of first impression, this Court will first look to the language of the statute itself and second, to the statute's legislative history. This analysis is overshadowed by the fundamental principle that criminal statutes are to be construed narrowly. FCC Company v. American Broadcasting Company, 347 U.S. 284, 296 (1954). In construing the statute narrowly, the plain meaning of the words used controls, absent a clear expressed legislative intent to the contrary. Powell v. Tuscon Air Museum Foundations of Pima County, 771 F.2d 1309, 1311 (9th Cir. 1985).

A plain, common sense, reading of 18 U.S.C. §2113(a) makes it abundantly clear that force and violence or intimidation must be established in order to sustain a conviction for either bank robbery or attempted bank robbery. As the Court in Baker reasoned, the attempt relates to the taking and not to the intimidation, force or violence. In this case, there was absolutely no display of force, violence or intimidation.

CONCLUSION

The Ninth Circuit applied in this case the same standard governing attempts applied within the other circuits. It reached the unremarkable conclusion that the Government had failed to introduce evidence establishing STILL had crossed the line between preparation and attempt by directing actual conduct toward his criminal goal. Presumably the other circuits applying this same test would reach the same result.

Assuming this Court would reach a different result applying the same standard to these facts, this nonetheless does not merit the granting of certiorari. This Court sits to establish uniformity rather than to correct isolated error. The standard applied by the Ninth Circuit is correct.

Were the Court to grant certiorari and remand for application of a different standard, remand would likely make no difference in this case. The government not only failed to introduce evidence of conduct directed toward a specified criminal goal, it also failed to introduce evidence of the threatened force, violence or intimidation needed to establish an attempted bank robbery.

The petition for certiorari should be denied.

DATED: January 17, 1989

SEGAL & KIRBY

BY _____
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In Forma Paperis

Supreme Court, U.S.
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No. 88-581 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

REGINALD DEAN STILL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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8PP.

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In this case, the Ninth Circuit held that a person must be "actual[ly] mov[ing]" toward a bank or undertake steps that are "analytically similar to such movement," Pet. App. 7a, before he has committed attempted bank robbery, regardless of his proximity to the bank or other proof clearly demonstrating that a bank robbery is about to transpire. Respondent makes no attempt to defend that rule of law. Instead, he offers several reasons why the decision below does not warrant review by this Court. None, however, has merit.

1. Respondent contends (Br. in Opp. 5-8) that the Ninth Circuit's decision in this case does not conflict with the decisions from the Second, Fourth, Seventh, and Eighth Circuits cited in our petition (at 8-10) because the Ninth Circuit also applied the ALI Model Penal Code definition of an attempt to the Bank Robbery Act, 18 U.S.C. 2113(a) (1982 & Supp. IV 1986). That claim misses

the point. As we explained in our petition (at 12-13), although the Ninth Circuit purported to apply the Model Penal Code definition to the Bank Robbery Act, that court adopted the additional requirement, unknown to the Model Penal Code or to any other federal circuit decision, that a bank robber must be actually moving toward the bank or engage in analytically similar conduct before he can be found guilty of attempted bank robbery. Neither the Second, Fourth, Seventh, nor Eighth Circuit has adopted that requirement. On the contrary, those courts have upheld convictions for attempted bank robbery under circumstances in which the accused was engaged in no such conduct when his plans were foiled. The decision below therefore cannot be reconciled with the decisions from the other circuits that are cited in our petition.

2. Petitioner attempts to explain away the conflict among the circuits by arguing (Br. in Opp. 7-8) that the government did not prove that he had taken any steps to rob the Security Pacific Bank, rather than some other bank or a retail store, when he was stopped by Officer Hensley. That claim is meritless. The Ninth Circuit found that petitioner had "an unequivocal intent to rob the Security Pacific Bank," Pet. App. 6a, and that finding is plainly correct. Petitioner admitted that he was about to rob a bank; petitioner was spotted in a parking lot only 200 feet from the Security Pacific Bank; petitioner's description of his target matched the Security Pacific Bank; none of the other 38 banks within a five-mile radius of the shopping center where petitioner was spotted fits that description; petitioner said that the Security Pacific Bank sounded like the name of his target; that bank has a drive-up teller's window; affixed to petitioner's fake bomb was tape that could be used to attach the bomb to the window; and one of petitioner's demand notes expressly told

the teller "DO NOT BE RESPONSIBLE FOR DESTROYING YOUR *BANK* AND KILLING THE PEOPLE," GX 3 (emphasis added). See Pet. 4-5; Pet. App. 3a-4a. In light of that evidence, petitioner is quite wrong in asserting (Br. in Opp. 8 (emphasis omitted)) that the government proved no "conduct directed toward the robbery of that particular bank." His conduct is explicable only on the ground that it was "specifically directed towards that bank" (Br. in Opp. 7), and not some other facility.

3. Petitioner also contends (Br. in Opp. 7) that the decision below is, at most, an isolated misapplication of the Model Penal Code's definition of an attempt. That argument is unpersuasive.

As we explained in our petition (at 6-7 & n.4, 15), the Ninth Circuit first adopted the rule in question in *United States* v. *Buffington*, 815 F.2d 1292 (1987). Even if the decision in *Buffington* could be considered an isolated aberration, the Ninth Circuit has now applied that rule again in this case and appears ready to apply it as well in any future case involving roughly similar facts. Moreover, as the decisions from the Ninth Circuit and other courts of appeals demonstrate, cases such as this one arise with some frequency. Either because of informants' tips, good police work, or citizens' observations, law enforcement officers often find themselves in a position to halt a bank robbery before the robbers have actually entered the bank. If the officers must wait until the robbers have entered the bank or begun moving toward it before making arrests, the danger of injury to officers, innocent citizens, and the robbers themselves is obviously increased. The Ninth Circuit's rule thus imposes a pointless requirement that will interfere with the interception and prosecution of bank robbery attempts in a significant number of cases.

4. Petitioner argues (Br. in Opp. 9) that, although "his conduct was no doubt suspicious enough to merit police inquiry, if not arrest," it was insufficient to support his conviction. The Ninth Circuit, he argues, "does not require physical proximity"; it demands only "some unequivocal conduct directed toward the criminal objective," and he undertook no such conduct. *Ibid.*

Respondent, however, has misstated the Ninth Circuit's test. That court set aside respondent's conviction because it found that "[o]ur facts do not establish either actual movement toward the bank or actions that are analytically similar to such movement." Pet. App. 7a. If the Ninth Circuit's standard could be satisfied simply by "some unequivocal conduct directed toward the criminal objective," the evidence here would have been more than sufficient. Respondent constructed a realistic-looking fake bomb, he prepared that bomb for use, and he drafted two demand notes threatening to blow up the bank and kill everyone in the vicinity if his demands were not met. Those are precisely the types of steps that precede a bank robbery and therefore fit the Second Circuit's description of acts that are "uniquely criminal and generally incompatible with innocent purpose." *United States* v. *Manley*, 632 F.2d 978, 989 (1980), cert. denied, 449 U.S. 1112 (1981). See *United States* v. *Jackson*, 560 F.2d 112, 120 (2d Cir.), certs. denied, 434 U.S. 941 (1977) and 434 U.S. 1017 (1978).

5. Finally, petitioner argues (Br. in Opp. 10-11) that the judgment below should be upheld on a different ground, one that the Ninth Circuit did not consider. In petitioner's view, the Bank Robbery Act requires that a person actually use force or intimidation against a bank employee before that person can be convicted of attempted bank robbery. Because he confronted no one before he was seen by the police, petitioner argues, he cannot be found guilty of that crime.

That position is even more restrictive than the Ninth Circuit's rule. Under petitioner's interpretation of the Act, he would not have committed attempted bank robbery until *after* he had driven over to the bank and *after* he had placed the fake bomb and first demand note on the teller's window. The only authority cited by petitioner to support that strange result is dictum in a 1955 district court decision, *United States* v. *Baker*, 129 F. Supp. 684, 686 (S.D. Cal.),* and that dictum is irreconcilable with the circuit court decisions cited in our petition. In fact, in *United States* v. *Jackson*, 560 F.2d at 116, quoting *United States* v. *Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976), the Second Circuit expressly rejected the dictum in *Baker*, stressing that " '[a]ttempt is a subtle concept that requires a rational and logically sound definition, one that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled.' "

Petitioner's interpretation of the attempt provision also misreads the plain text of the Bank Robbery Act. The phrase "by force and violence, or by intimidation" modifies both the verb "takes" and the verb "attempts." In the case of an attempt, that phrase requires only that a person would have used such means if his crime had succeeded. The Act does not require the actual use of force or intimidation to complete an attempt. In this case, petitioner's homemade fake bomb shows that he would have taken the bank's money "by intimidation" if he had been

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* In *Baker*, the district court upheld the defendant's attempted bank robbery conviction because he used a means of intimidation, 129 F. Supp. at 687, so the court had no occasion to decide whether the actual use of force or intimidation is an essential element of that crime.

successful, which is all that the Bank Robbery Act requires.

For the foregoing reasons and those given in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM C. BRYSON
Acting Solicitor General

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